SUPREME COURT, U. S.

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No. 74-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

RICHARD F. NESTLER, DONALD B. MAY,
NESTLER-MAY COMPANY, *Petitioners,*

v.

CHARLES R. RICHEY,
UNITED STATES DISTRICT JUDGE, *Respondent.*

OPPOSITION OF EXXON CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners seek a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petitioners charge that the Honorable Charles R. Richey, United States District Court Judge, abused his discretion in granting a motion of Exxon Corporation to strike petitioners' jury demand in an action entitled *Richard F. Nestler, et al.* v. *Exxon Corpora-*

tion, Civil Action No. 1686-73, pending in the United States District Court for the District of Columbia.

COUNTERSTATEMENT OF THE CASE

The summons and complaint in the above-mentioned action were filed by petitioners on August 31, 1973. No jury demand was made by petitioners at that time.

On October 9, 1973, Exxon Corporation filed its answer to the complaint. No jury demand was made by Exxon, nor was a jury demand made by petitioners or Exxon Corporation within 10 days after service of the answer, which was the last pleading directed to the issues involved in this case.

On October 9, 1973, Exxon Corporation also filed and served on petitioners interrogatories and a motion for production of documents.

On January 21, 1974, petitioners answered the interrogatories. During that period, petitioners also responded to Exxon's motion for production of documents.

On February 11, 1974, petitioners filed and served a demand for a jury trial. On that same day, Exxon Corporation moved to strike the jury demand on the ground that petitioners' right to a jury trial had been waived pursuant to the provisions of Rule 38 of the Federal Rules of Civil Procedure.

On March 7, 1974, the District Court (Richey J.) entered an order granting Exxon's motion to strike petitioners' jury demand.

Thereafter, on April 12, 1974, petitioners filed a petition for a writ of mandamus with the United States

Court of Appeals for the District of Columbia Circuit. That petition sought an order requiring the District Court to grant petitioners' jury demand.

On April 25, 1974, an order was entered by the Court of Appeals denying the petition for a writ of mandamus.[1]

ARGUMENT

Rule 38(b) of the Federal Rules of Civil Procedure provides in part as follows:

> "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue."

Rule 38(d) provides in part as follows:

> "The failure of a party to serve a demand as required by this rule . . . constitutes a waiver by him of trial by jury."

As noted above, neither the petitioners nor Exxon Corporation made a jury demand within 10 days after the service of the answer. Petitioners assert that the interrogatories served by Exxon Corporation "for

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[1] Exxon Corporation was not named as a party in the caption of the petition for a writ of mandamus, nor is Exxon named as a party in the caption of the petition for a writ of certiorari. However, Rule 21(b) of the Federal Rules of Civil Procedure provides in part that in connection with an application for a writ of mandamus, "[a]ll parties below other than the petitioners shall also be deemed respondents for all purposes. Rule 21.4 of the Rules of the Supreme Court of the United States provides that [a]ll parties to the proceedings in the court whose judgment is sought to be reviewed shall be deemed parties in this court. . . ." Accordingly, it would seem that Exxon Corporation does have standing to oppose this petition for a writ of certiorari.

the first time raised issues which petitioners believe fairly entitle them to . . . have a jury trial." (Pet., 5) Petitioners have not included their complaint as a part of the appendix, nor have they included Exxon's interrogatories. Accordingly, there is no way to tell from the petition whether or not the interrogatories related to issues not raised by the complaint. The fact is that the interrogatories raised no new issues. Petitioners were free to object to any interrogatories they believed were unrelated to issues raised by the complaint, but no objection was made to any of the interrogatories.

Moreover, petitioners waited for more than four months following serving and filing of the interrogatories, and several weeks after answering them, before filing their jury demand. This clearly indicates that the belated jury demand was filed because, for some unknown reason, petitioners changed their minds.

Petitioners' contentions, in any event, are without merit as shown by decisions of the Supreme Court of the United States, as well as several Circuit Courts. *United States* v. *Moore,* 340 U.S. 616, 621 (1951); *Bush* v. *Allstate Insurance Company,* 425 F.2d 393 (5th Cir. 1970); *Murphy* v. *Shelby,* 353 F.2d 418 (8th Cir. 1965); *General Tire & Rubber Company* v. *Watkins,* 331 F.2d 192 (4th Cir. 1964), *cert. denied,* 377 U.S. 952 (19); *Tomlin* v. *Pope & Talbot, Inc.,* 282 F.2d 447 (9th Cir. 1960); *Moore* v. *United States,* 196 F.2d 906, 908 (1952).

In *Tomlin* v. *Pope & Talbot, Inc., supra,* the appellant relied on the provisions of Rule 39(b) of the Federal Rules of Civil Procedure, just as petitioners have done. However, the Ninth Circuit noted that this rule leaves it to the discretion of the court to decide whether

or not to order a trial by jury where, as here, timely demand had not been made. The court said:

> "The view has been stated that as a matter of judicial administration discretion ought rarely to be exercised to grant a trial by jury in default of a timely request for it. . . ."
>
> "The denial of a motion under this rule [39(b)] is to be sustained unless abuse of judicial discretion is shown. See Johnson v. Gardner, 9 Cir., 179 F.2d 114, 118. For this reason appellate courts normally refuse to interfere. 5 Moore's Federal Practice, 2d ed., § 39.09, page 715." (282 F.2d at 449)

There is no basis for concluding that Judge Richey abused his discretion in striking petitioners' belated demand. No valid reasons for taking such action were presented to him, nor has any been presented to this Court.

In *Bush* v. *Allstate Insurance Company, supra,* the Fifth Circuit stated:

> "It is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion . . . where the failure to make a timely demand for a jury trial results from mere inadvertence on the part of the moving party." (425 F.2d at 396)

Petitioners' conduct here does not even rise (or fall) to the level of inadvertence. Rather, we have an admittedly deliberate decision not to demand a jury trial followed by a change of mind several months later. The asserted reason for the change of mind is without foundation, and there is no way to find out the real reason.

Most of the cases cited by petitioners are completely inapposite and do not merit discussion. Reference will be made, however, to *Beacon Theatres* v. *Westover,* 359 U.S. 500 (1959), since petitioners lay such stress on that case.

It is readily apparent that the facts in that case were totally different from those in the instant case because early in its opinion the Supreme Court stated:

> "Beacon demanded a jury trial of the factual issues in the case as provided by Federal Rule of Civil Procedure 38(b)." (359 U.S. at 503)

Of course, no effort was made here to follow the requirements of Rule 38(b). Accordingly, that decision also is inapposite.

CONCLUSION

In view of the foregoing, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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